PP

v.

LAU NGIIK YIN

HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[CRIMINAL TRIAL NO: 45-7-2006]
12 DECEMBER 2007

CRIMINAL PROCEDURE: *Acquittal or discharge - Discharge not amounting to acquittal - Prerequisites for order thereof - Failure to locate important witness - Whether a good ground - Whether must show that witness could be procured within reasonable time - Prosecution and power to prosecute - Criminal Procedure Code s. 254 - Federal Constitution art. 145(3)*

The accused herein was arrested on 13 March 2006 and was charged with the offence of murder under s. 302 Penal Code. On 8 November 2007, the date fixed for hearing of the case and by which time the accused was already in custody for 20 months, the prosecution applied for an order of discharge not amounting to an acquittal ('DNAA') pursuant to s. 254 Criminal Procedure Code on the ground that it was unable to locate one of its main witnesses. The defence argued that a DNAA was unfair in the circumstances, and in any case applied for the accused to be fully acquitted and discharged. It was the defence's contention that a full acquittal was warranted bearing in mind the authorities of *Koh Teck Chai v. PP*, *K. Abdul Rasheed v. PP* and *Ah Chak Arnold v. PP*.

Held:

(1) The court must order an acquittal and not a DNAA when the prosecutor has shown disinterestedness in prosecuting the case or is unable to prosecute the case for good reasons and it is unlikely that the case can be prosecuted in the short future. The liberty of His Majesty's subject cannot be placed by a continuous threat of prosecution by only an order of discharge. Such an order may be against constitutional guarantees and support for this proposition can be garnered from *Koh Teck Chai v. PP*, *K. Abdul Rasheed v. PP*, *PP v. Syed Abdul Bahari Shahabuddin*, *PP v. An She Chun*, *PP v. Z* and *PP v. Lee Chan Sang, inter alia*. (para 4)

(2) The court is the supreme arbiter of what is right and wrong, and hence the submission that the decision and powers of the Public Prosecutor is immutable and cannot be questioned by the court is unsustainable under the Federal Constitution. The Federal Court in *Long bin Samat & Ors v. PP* did not say that the decision of the Public Prosecutor is immutable. (paras 5 & 6)

(3) The court must be seen as the protector and guarantor of fundamental rights, and cannot, consistently with the responsibility so laid upon, refuse to entertain applications seeking protection against infringements of such rights. Clearly, a wrongful prosecution or abusive or oppressive prosecution or failure to prosecute will create much imbalance in the provisions of the Federal Constitution. (para 6)

(4) On the facts, a DNAA is not appropriate because the accused has been in custody for some 20 months and because there is no evidence to say that the witness can be procured within a reasonable time. The court is however mindful of the impact of an acquittal and the need to balance public interest to ensure that justice is met in all circumstances. Consequently, the court will give an opportunity to the prosecution to decide whether they can prosecute within a reasonable time, failing which the court will order an acquittal. (para 7)

Case(s) referred to:

Chu Chee Peng v. PP [1973] 2 MLJ 35 ***(refd)***

Chong Chung Moi v. The Government of the State of Sabah & Ors [2007] 5 MLJ 441 ***(refd)***

Hiew Kon Fah & Anor v. Kwan Ngen Wah & Ors [2007] 5 CLJ 538 HC ***(refd)***

K Abdul Rasheed v. PP and Ah Chak Arnold v. PP [1985] 1 LNS 54 HC ***(refd)***

Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***

Koh Teck Chai v. PP [1967] 1 LNS 72 HC ***(refd)***

Leken Gerik v. PP [2007] 8 CLJ 158 HC ***(refd)***

Poh Cho Ching v. PP [1981] CLJ 42; [1981] CLJ (Rep) 229 HC ***(refd)***

PP v. Au Seh Chun [1998] 6 MLJ 179 ***(refd)***

PP v. Hettiarachigae LS Perera [1976] 1 LNS 98 HC ***(refd)***

PP v. Karumah [1980] 2 MLJ 102 ***(refd)***

PP v. Lee Chan Sang [1989] 1 CLJ 144; [1989] 1 CLJ (Rep) 139 SC ***(refd)***

PP v. Syed Abdul Bahari Shahabuddin [1975] 1 LNS 137 HC ***(refd)***

PP v. Z [1995] 4 CLJ 383 HC ***(refd)***

PP v. Zainuddin [1986] 2 MLJ 100 ***(refd)***

Ramesh Thapar v. State of Madras, AIR 1950 SC 124 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(g), 254(1), (2), 302, 303
Federal Constitution, art. 145
Penal Code, ss. 34, 183(2)

For the prosecution - Ahmad Zubir Jantan; DPP
For the accused - Orlando Chua; M/s Wong, Orlando Chua & Kuok Advocates

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the oral application of the accused to be discharged and acquitted, upon the prosecution informing the court that they are seeking a discharge not amounting to an acquittal (DNAA) on the grounds that one of the main witnesses could not be traced.

Brief Facts

[2] The accused was charged with murder punishable under s. 302 of the Penal Code read together with s. 34 of the said Code. The charge reads as follows:

> That you, together with Hii Lam King & 6 others who are still at large, on the 6th day of February 2004, at about 10:00 p.m. at the five foot-way of Chieng Siang Leu Restaurant, Pusat Tanahwang, Pedada Road, Sibu, in the State of Sarawak, in furtherance of the common intention of you all committed murder by causing death of Ha Jong Juan (m)(KPT: 630515-13-5139) and you have thereby committed an offence punishable under section 302 of the Penal Code and read with section 34 of the same Code.

The offence was alleged to have been committed on 6 February 2004 but the accused was arrested on 13 March 2006 and till date he is in custody. On 8 November 2007, the date fixed for hearing, the prosecution informed the court that the chambers had instructed to apply for discharge not amounting to acquittal (DNAA) on the grounds that the police are not able to locate one important witness. The defence immediately objected and said that the accused was in custody for the past 20 months and the matter was previously fixed for hearing and for mentions on several occasions and it is unfair and oppressive against the accused for the prosecution to request DNAA when the accused should

be discharged and acquitted in reliance of the case of *Koh Teck Chai v. PP* [1967] 1 LNS 72 HC; *K. Abdul Rasheed v. PP and Ah Chak Arnold v. PP* [1985] 1 LNS 54.

Issues

[3] The central issue to this application is whether an acquittal can be granted as of right or is only a discretionary relief at this stage of the proceedings. In the event the acquittal is a discretionary relief in what circumstances can the acquittal be granted.

The Law

[4] The Federal Constitution and the Criminal Procedure Code (CPC) gives wide powers to the Public Prosecutor to decide whether to prosecute or not to prosecute and/or to decline to prosecute at any stage of the proceedings. The prosecution's application for DNAA is made pursuant to s. 254 of the CPC. The section reads as follows:

> (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
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> (2) At any stage of any trial before a session court or a magistrates court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the court and, if so stayed, the accused shall be discharged of and from the same.
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> (3) Such discharge shall not amount to an acquittal unless the court so directs.

In my view the court must order an acquittal and not DNAA, when the prosecutor has shown disinterestedness in prosecuting the case or the prosecution is not able to prosecute the case for good reasons and it is unlikely the case can be prosecuted expeditiously in the short future. This is so because the liberty of His Majesty's subject cannot be placed by a continuous threat of prosecution by only an order of discharge. Such an order may be against constitutional guarantees. Support for my proposition can be garnered from a number of cases.

(a) In *Koh Teck Chai (supra)* the court opined that the power enabling the discharge of the accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only

where the court is satisfied for good cause shown that the public interest demands that it be used. Our courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him. In the circumstances of that case the order of the learned magistrate was varied so that the discharge amounted to an acquittal. Ong Hock Sim J opined:

> Section 187(1) of the S.S. Code is identical with section 254(ii) and the application was made under that section so that is clear that the learned magistrate had power to order an acquittal.
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> This power enabling the discharge of an accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used. (Seet *Ah Ann v. Public Prosecutor*). Our courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him. (*Goh Oon Keow v. R; Tan Sh Chan v. R.*). As Mr. Justice Spenser-Wilkinson said in *Public Prosecutor v. Suppiah Pather* reported in Editorial Note to *Ariffin bin Cassim Jayne v. Public Prosecutor*:
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> > If the prosecution are not ready to proceed with their case after reasonable adjournments have been granted, an accused person should not be allowed to suffer from the dilatoriness of the prosecution by being left with a charge hanging over his head indefinitely.
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> > Where the prosecution are unable to proceed for the time being owing to the difficulty of obtaining a witness or for some other cause and are unable to satisfy the court that they will proceed with the prosecution within a reasonable time, then there would be good grounds for a discharge not amounting to an acquittal. In this case, however, although counsel apparently only asked for a discharged not amounting to an acquittal I think the proper order would have been a discharge amounting to an acquittal.

(b) The above case was considered in *K. Abdul Rasheed (supra)*. Lai Kew Chai J held that "in exercising the power under sub-s. 183(2) of the Code, a court must bear in mind and give due regard to the right of the prosecution to proceed at a later state. On the other hand, there is ample persuasive authority for the proposition that unless some good ground is shown it would not be right to leave an individual saddled with a charge in which proceedings are stayed for an indeterminate period".

(c) In *PP v. Syed Abdul Bahari Shahabuddin* [1975] 1 LNS 137 it was stated that unless there are good grounds to the contrary, a discharge under s. 254 of the Code should amount to an acquittal. The court asserted that good grounds would arise where the prosecution is unable to proceed for the time being but can satisfy the court that the temporary impediment is not insurmountable and that it will proceed within a reasonable time. Further the court stated that an order of discharge not amounting to an acquittal is no bar to a second prosecution.

(d) In *PP v. Au Seh Chun* [1998] 6 MLJ 179 the court considered the provision of ss. 173(g) and 254 of the Code and observed:

> Under section 254, at any stage of any trial before the delivery of any judgment, the Public Prosecutor may inform the court that he will not further prosecute the charge and thereupon the accused shall be acquittal. In other words there is no necessity for the magistrate to consider further as to the viability of the charge but merely to acquit and discharge the accused after being informed. Under this provision, unlike that of section 173(f), the evidence is yet to be hard or adduced by the prosecution. Where the proposal of not continuing with the prosecution comes from the prosecuting officer, leave must first be obtained from the court. This difference of approach is perhaps due to the desire of Parliament to permit the court to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purpose by the latter's prosecutors.
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> Under this provision, such discharge shall not amount to an acquittal unless the court directs. In other words, for him to be recorded to have been acquitted, it must be pursuant to the pro-active act of the learned magistrate who must so specify the details. Notwithstanding this supposed room given to the magistrate, it is quite established that whenever the prosecution has indicated to the court that it is not interested in pursuing the matter, the court then shall acquit the accused.

(e) In *PP v. Z* [1995] 4 CLJ 383, s. 254 of the CPC was considered. The court opined:

> It is important to note the difference between subsections (1) and subsection (2). The former refers to the Public Prosecutor whilst the latter refers to a prosecuting officer. It will be observed that in subsection (1) it is provided that the Public Prosecutor may inform the court 'he will not further prosecute the accused' whereas in subsection (2) it is provided that the prosecuting officer may inform the court that he 'does not

propose further to prosecute the accused'. It will also be observed that the effect on the court on being so informed is different between the two subsections. In subsection (1), the effect is that the court shall stay all proceedings and the accused shall be discharged. There is, therefore, no discretion on the part of the court; whereas, subsection (2) merely provides that 'all proceedings on such charge against the accused may be stayed by leave of the court and, if not stayed, the accused shall be discharged'. This seems to imply that where it is only the prosecuting officer that informs the court, there is no automatic stay of proceedings; the court still has some discretion. The court may, if it thinks fit, refuse to stay the proceedings, which means that the prosecuting officer must proceed with the trial; and where the court refuses stay of proceedings, the question of discharge does not arise. It may well be that, in any case where the court thinks fit to refuse stay, the prosecuting officer may not be happy with the decision, but should that be the case then the latter should apply for, and the court should grant, a short adjournment to enable the prosecuting officer to refer the matter to the Public Prosecutor for a directive. But I suppose it would be only in rare and exceptional cases where the court would refuse a stay. However, if the court grants the stay then the accused is entitled to an automatic discharge.

(f) In *PP v. Lee Chan Sang* [1989] 1 CLJ 144; [1989] 1 CLJ (Rep) 139, the Supreme Court stated that s. 254 of the Code deals with the power of the Public Prosecutor to decline to prosecute further at any stage of the trial. Further the court observed that it is clear from the language of the s. 254(1) and (2) that the power of the Public Prosecutor is exercisable at any stage of any trial. Further the court stated that s. 254 of the Code cannot apply to that case because no trial had commenced before the magistrate.

(g) In *Poh Cho Ching* [1981] CLJ 42; [1981] CLJ (Rep) 229 Wan Yahya J (as His Lordship then was) in considering s. 254 of the Code took the view that this power, exercisable by the Public Prosecutor, who is the Attorney General, is similar to the power to stay proceedings in English courts and better known technically as nolle prosequi. This power may be invoked by the Attorney General in various instances, to cite one instance, in cases where he requires a co-accused to give evidence for the crown against the other accused person. This power undoubtedly confers upon the Attorney General an unrestricted discretion in respect of which he is expected to exercise extreme fairness and sagacity. But whether he does so or not, it is not for the courts to decide.

(h) In *PP v. Hettiarachigae LS Perera* [1976] 1 LNS 98 Harun J (as His Lordship then was) was of the view that according to art. 145 of the Federal Constitution, only the Attorney General has the power to institute, conduct or discontinue any proceedings for an offence. Until he makes up his mind, the courts have to wait. The court asserted that the magistrates therefore have no business to usurp the functions of the Attorney General and if the police are slow, complaints should be made to the Attorney General who in the final analysis is answerable to Parliament.

Prosecution's Argument

[5] The prosecution relied on a number of cases to support the proposition that it will only be proper to order DNAA at this stage of proceedings. The cases are as follows: (i) *PP v. Karumah* [1980] 2 MLJ 102; (ii) *Chu Chee Peng v. PP* [1973] 2 MLJ 35; (iii) *PP v. Zainuddin* [1986] 2 MLJ 100; (vi) *Karpal Singh v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183. More importantly the prosecution says and asserts as follows:

> Article 145(3) of the Federal Constitution and section 376 CPC give the AG an exclusive power respecting direction and control over criminal matters. Article 145(3) FC declares that "the AG shall have power, exercisable at his discretion to institute, conduct or discontinuance any proceeding for an offence ..." Therefore it is not for the court to say when the prosecution has to come to an end and thus acquit the accused on the basis of no evidence. If the court acquit the accused without hearing the evidence they have usurped the PP's powers because the court has no power to stop the prosecution from performing its duty by acquitting without hearing the evidence.

The submission of the prosecutor that the decision and powers of the Public Prosecutor is immutable and cannot be questioned by the court is a proposition unsustainable under the Federal Constitution. The court is the supreme arbiter of what is right and wrong. Any public decision maker is always subject to judicial scrutiny. Ordinarily a challenge on the decision of any public decision maker is done by way of proper application within the concept of judicial review. That does not necessarily mean that the court has no powers or jurisdiction at any time to exercise its prerogative powers, when justice demands.

Such prerogative powers will only be exercised in extreme situation either when it is necessary and essential to protect and safeguard the Federal Constitution and/or where the spirit and intent of the Federal Constitution is violently breached by the public decision maker. I have dealt with the principles relating to prerogative powers, orders and

directions in a number of cases to name a few are as follows: (i) *Chong Chung Moi @ Christine Chong v. The Government of the State of Sabah & Ors.* [2007] 4 AMR 472; [2007] 5 MLJ 441; (ii) *Hiew Kon Fah & Anor v. Kwan Ngen Wah & Ors* [2007] 5 CLJ 538. In *Leken Gerik (M) v. PP* [2007] 8 CLJ 158, I have stated:

> ... Further, the court can do very little to correct the miscarriage as it is accepted that the Federal Constitution gives very wide powers to the prosecution and it is for them to act within the letters and spirit of the federal constitution and various other statutory provisions. In *Long bin Samat & Ors. v. Public Prosecutor* [1974] 2 MLJ 152, the Federal Court stated that:
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> > ... On independence the Federal Constitution came into force, and clause (3) of its Article 145 (as amended) provides:
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> > > The Attorney-General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial.
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> In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pages 32-3 in *Smedleys Ltd v. Breed* [5 1974] 2 All ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.
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> ...
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> ... Having the control and direction of criminal prosecution and proceedings given to him by section 376(i) of the Criminal Procedure Code the Public Prosecutor has a duty to conduct prosecutions in the best interests of justice... . (Emphasis added)
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> It must be stated here that subject to the last paragraph above the right to prosecute in any manner the prosecution thinks fit vest with the prosecution, to balance it parliament has left the powers of sentencing with the court and in this process court can take proactive steps to check any form of accesses.

[6] In my view the Federal Court in *Long bin Samat (supra)* did not say that the decision of the Public Prosecutor is immutable. Such a construction will impinge on the role of the court as the protector of the Federal Constitution. A wrongful prosecution or abusive or

A oppressive prosecution or failure to prosecute will create much imbalance in a number of provisions in the Federal Constitution which gives absolute protection to fundamental guarantees. As the Public Prosecutor enjoys his office directly and/or indirectly at the pleasure of executive, hence courts are constitutionally duty bound to safe guard executive
B encroachment. In the same context courts will rarely intervene in the decision making process of the public prosecutor to maintain law and order, unless public interest compels the court to do so. The court is and must be seen as the protector and guarantor of fundamental rights, and cannot consistently with the responsibility so laid upon it, refuse to
C entertain applications seeking protection against infringement of such rights. (See *Ramesh Thapar v. State of Madras*, AIR 1950 SC 124). Failure of the court to do so will create social anarchy and disinterestedness in judicial process, which will finally lead the public to have no faith in the administration of justice. The few exceptions to the privileged powers of the Public Prosecutor embedded in art. 145 of the
D Federal Constitution are seen in s. 254 of the CPC because the said section itself gives powers to the court to order an acquittal. (See 302 and 303 CPC).

When a person is aggrieved by the decision to prosecute or not to
E prosecute it is upon him to avail the relevant forum to challenge the decision of the public decision maker. In almost all cases such challenge will not be entertained by the courts more so in the criminal proceedings itself though such an issue will not be a bar for judicial review in appropriate cases.

F **[7]** I have read the submission of the prosecution and defence in detail. I take the view that the DNAA on the facts of this case is not appropriate and my reasons are as follows:

(i) The accused is in custody for the last 20 months.

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(ii) There is no evidence to say that the witness can be procured within a reasonable time.

I am mindful of the impact of an acquittal and the need to balance public interest to ensure that justice is met out in all circumstances. Justice
H must be seen to be met out for both the victim as well as the accused. For that reason I will give an opportunity to the prosecution to decide whether they can prosecute within a reasonable time. Failing which, I will have no alternative but to order an acquittal.

I